On October 22, 1956 (See Comm. Rep. pp. 9-11 for chronology of this and succeeding dates), the Advisory Committee (Respondents here—Informants below) filed Information direct in the Supreme Court of Missouri. This Information is set out verbatim with the Petition. (Pet. pp. A1-18) The first requirement of due process is that the accused have written formal apprisal of the charges against him. The accused here does not contend no notice.

What we must remember is that this case started on October 22, 1956, when this information was filed in the Supreme Court of Missouri; and that the investigation of the Advisory Committee under rule 5.03 prior to the filing of the information could not possibly deny the accused due process except and unless evidence taken by the Advisory Committee in its formal or informal hearings incident to determination only of reasonable or probable cause was used against the accused over his objection and where he had not been given the right to confront and cross-examine such witnesses.

It is apparent that in reality rule 5 of the Supreme Court of Missouri augments rather than denies due process to an accused attorney. It is apparent from reading Rule 5 that the Advisory Committee carries out a similar function to that of a Grand Jury in a criminal case. As stated by the Missouri Supreme Court in *In re Connor*, 357 Mo. 270, 207 S.W.2d 492 (cited with approval by Petitioner), the first duty of the Committee is investigation. That is also the primary duty of a grand jury. But the grand jury can return an indictment and bring the accused into open court (1) without giving the accused any written or formal notice of the charges against him, (2) without giving the accused any right to defend or introduce evidence on the issue of probable or reasonable cause to prevent indictment, (3) without giving the accused any right

to confront and cross-examine his accusers or any adverse witness at the grand jury level. All three of these rights are granted to an accused attorney under rule 5.03 so that he is afforded far more due process than in a criminal case.

These are the rights granted an accused attorney in any disciplinary action in Missouri. These rights were granted to the accused in this case. Petitioner now complains that he was denied due process in this case because the testimony of four witnesses (Jarboe, Smith, Carignan, and Tuggle) was taken at formal hearing before the Advisory Committee prior to the filing of the information in this case (yet it is conceded that in each and every case the Petitioner confronted and cross-examined the witness) and that in each case the testimony of the witness was admitted not only without objection but With the Express Consent and Stipulation of the Petitioner. The Petitioner admits this (Pet. p. 97) (merely saying he would not have so stipulated had he known how the Court was going to construe the testimony). In order that there be no question in this regard the verbatim record is set out in Respondent's Appendix I.

The Petitioner contends (with repetition) due process was denied because all investigations at the committee level under rule 5.03 are and were confidential (the same as a grand jury proceeding) until probable cause has been voted and a case filed. Secrecy (before probable cause is voted) is for the protection of the accused attorney. Petitioner's reasoning would invalidate any criminal indictment by a grand jury whose proceedings are always secret.

Continuing with the chronology of the record: On October 22 (the day the information was filed) the Petitioner filed a motion (orally argued by his attorney Wm.

G. Boatright, now deceased) before the Supreme Court *en banc* to withhold the record from the public and hold secret hearings. This was denied by the court. There was not a single secret hearing after this case was filed in the Supreme Court of Missouri.

Petitioner contends throughout his petition that the hearing before the committee was biased, prejudiced and unfair and the evidence improperly obtained (he says he even complained to the Supreme Court prior to the filing of this case on October 22) yet on October 30, eight days after the Information was filed, Petitioner filed offer in writing with the Supreme Court of Missouri "to submit the case on transcript of hearings before Advisory Committee." (Comm. Rep. p. 9) This offer was refused by the Court which required full hearings and no evidence was adduced without the express ruling as to admissibility thereof by the Court's Commissioner. The Petitioner here does not raise a single question that evidence was improperly admitted —the contention is that petitioner was denied due process because the Court did not draw the inferences therefrom Petitioner desired (he says so in so many words at page 97 of the Petition).

In his Appendix, Petitioner sets out verbatim the Information filed on October 22. The record (Comm. Rep. p. 10) shows Petitioner filed answer to the charges on November 23. The Petitioner did not see fit to set out his own answer in his Appendix. Respondents have therefore requested the Clerk of the Supreme Court of Missouri to forward a certified copy of this answer to be added to the record already forwarded to the Clerk of this Court. This answer is significant because: (1) it did not raise a single constitutional question, state or Federal (2) it did not raise or put in issue a single question as to the constitutionality of Rule 5 or any constitutional question, especially as to

due process now raised in this Petition. There was no motion to quash the information and the Record does not show objection by Petitioner to any evidence on a constitutional or Federal question. The Appendix to the petition shows on its face the Petitioner did not attempt to raise any such questions until in briefs filed after the evidence was in and the case decided. We conclude no constitutional question was ever timely raised, but again respondent emphasizes that no constitutional right of Petitioner was in fact ever denied.

II. Impeachment Testimony—Only Considered As Such.

Petitioner contends (Pet. p. 7—par. 6(d) and 97) that the Missouri Supreme Court "ignored and refused to follow the rules of evidence" and accepted "as substantive proof testimony of Feezer relative to statement to him out of Court and not under oath of witness Mears, and similar testimony of Barrick of similar statements made to him under similar circumstances by witnesses Beck and Goodner whose testimony was admitted only for the limited purpose of impeachment."

It is agreed that the testimony of Feezer and Barrick (who interviewed some of Petitioner's clients for Missouri Bar) was admitted only for impeachment after foundation had been laid wherein these clients denied making such contradictory statements. In Missouri the report of the Special Commissioners is advisory only. (*In re Parkinson*, 128 S.W.2d 1023) The petition for the writ at bar is necessarily directed to the opinion of the Missouri Supreme Court (*In re C. A. Randolph*, 347 S.W.2d 91) which is set out verbatim in Petitioner's Appendix (Pet. pp. A18-59)—not to the Commissioner's findings which were advisory only.

In concise answer to this point it is respectfully submitted that the only part of this Missouri Supreme Court Opinion in any way relating to contradictory statements of Petitioner's clients to any representative of the Missouri Bar is found in Appendix to petition (Pet. pp. A53-A55) where the Opinion of the Missouri Court specifically restricts its consideration of such statements to impeachment —the limited purpose for which offered. The Supreme Court Opinion did not even consider or refer to any testimony of Mr. Feezer as the Petitioner indicates. A careful reading of the Opinion will show conclusively that the Supreme Court of Missouri never accepted as substantive proof any evidence admitted for the limited purpose of impeachment.

III. Quantum of Proof.

At page 117 the Petition for Writ herein contends in substance that the Tuggle, Carignan and Deason testimony summarized in the Opinion "were by the Court selected as the strongest cases to support the result reached."

Although the opinion shows strong direct testimony of these witnesses proving both solicitation and division of fees it is inaccurate to imply, as the Petition clearly does that the Opinion was based on the testimony in these three cases. In fact the Opinion clearly states (Pet. p. A30) that the testimony of these witnesses was set out in the Opinion to show that the constantly repeated statements of Petitioner in his briefs below that "no client (except Hice) gave any direct evidence of solicitation and division of fees" simply was not true. The court quoted from the record to expose the untruth.

It is not the intent—and surely not the duty of the Respondent here, the Advisory Committee, to review an

eleven volume record. However, because of Petitioner's assertion that the Opinion was based on the testimony of these three witnesses we would point out the undisputed proof in the Hice case was that Fenn drove Hice from Clovis, N.M., to Petitioner's office in Kansas City in Fenn's Cadillac automobile on the date Hice signed a 40% contingent fee employment contract with Petitioner and that Fenn received a cashier's check the date of the Hice settlement amounting to the odd penny to one half of Petitioner's fee; that Fenn received Cashier's checks amounting exactly to one half of Petitioner's fee in seventeen other Santa Fe Cases; that the so-called employment letter in the Taylor case was in Fenn's handwriting; that C. C. Jennings transported Pauline Brown (now Mayhon) from New Mexico to Kansas City in his automobile on the date she signed a 50% contingent fee contract with Petitioner and that Jennings received a cashier's check from the proceeds of the Brown or Mayhon settlement amounting to the odd penny of one half the amount of Petitioner's Attorney fee; that O. C. Brown transported Mrs. Jarboe to McDonald's office in Minneapolis in his Cadillac automobile and then direct to Petitioner's office in Kansas City the day she signed a 50% contingent fee contract with Petitioner and that Brown received a cashier's check from the Jarboe settlement in an amount exactly equal to one half the amount of Petitioner's attorney fee; and of clear solicitation by Fenn of the Spriggs case as hereinafter set out. Thus, it is inaccurate to say that the Opinion was based on the testimony of three witnesses. But more important the question of quantum of proof is not a matter for this Court's consideration as will be more fully covered in this brief. (Tr. 626, 965-973, 1153, 1617, 2564-74; Comm. Rep. 59, 66, 74, 84, 153.)

IV. Omissions and Inaccuracy—The Spriggs Case.

The Petition for the Writ herein (Pet. pp. 63-66) discusses the Spriggs case. We reply to this discussion briefly here as illustrative of omissions and inaccuracy indulged in by petitioner in summarizing evidence from the record.

Petitioner's summary though lengthy omitted to state: (1) that Spriggs, a Santa Fe employee, was killed several hundred miles from Clovis, New Mexico, at four o'clock in the afternoon of August 22, 1949; (2) that Fenn (whom the Court found to have been a solicitor for both McDonald and Petitioner) was at the Spriggs home in Clovis the evening of August 22, 1949, discussing employment of petitioner to sue the Railroad with the 18 year old widow of the deceased and her mother; (3) that on August 23, 1949, Fenn filled out (in his handwriting) contingent contract employing petitioner to prosecute the death claim against the Santa Fe which contract he promptly mailed to petitioner in Kansas City; (4) that at the time said contract was signed (within 24 hours of the death) Fenn was exhibiting to the Spriggs photostats of substantial settlement drafts McDonald had gotten in other F.E.L.A. cases; (5) that on August 29th, the Spriggs widow wrote Petitioner requesting release from the employment contract; (6) that on August 30th Petitioner wrote the Spriggs people in words and figures "You may, thereafter, disregard my *previous* employment in this case." (Emphasis ours) (Comm. Rep. pp. 7, 59, 87, 88) (R. Exs. 1-4 and pp. 2008-15) Petitioner's statement to this court (Pet. 65) that he "had no notion of accepting the contract" would be inaccurate in view of his own letter of August 30th advising the Spriggs to disregard his *previous* employment.

V. The Law Pertaining to Due Process and Sufficiency of Proof.

Lest the facts be lost in the voluminous contentions of petitioner, this is not a case decided on appeal to the Supreme Court of Missouri, nor a case decided by an administrative tribunal, Board or Committee, which the Court merely reviewed; this case was tried by the Supreme Court of Missouri, in the exercise of its original jurisdiction, as any ordinary trial would be conducted. Evidence was heard by the Court, through its Special Commissioner appointed by the Court to take evidence and report the same to the Court with findings of fact and declarations of law. In Missouri reports of Special Commissioners are advisory only. (*In re Parkinson*, 128 S.W.2d 1023, l.c. 1037) Briefs were filed and the cause argued before the Court, *en banc*, on the merits, on the pleadings and evidence. The Court then rendered its decision in its judicial capacity as the highest constitutional Court of Missouri and again considered the case on petitioner's motion for rehearing or judgment of acquittal.

This Court has said, respecting due process (*Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, l.c. 170), that:

> "It never has been doubted by this Court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law."

This Court, in *Cohen* v. *Hurley*, U.S. , 6 L. Ed. 2d 156, 81 S. Ct. , has recently reaffirmed the established rule of law with respect to the inherent power of the courts to exercise disciplinary powers over members of the Bar. This Court said, 6 L. Ed. 2d l.c. 162:

> "History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exercise of disciplinary powers which English and American Courts (the former primarily through the inns of Court) have for centuries possessed over members of the Bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigations long established, but the subject matter of the present investigation does not lack a rational basis."

The Cohen case involved failure of a lawyer to cooperate in an investigation respecting solicitation.

It can no longer be doubted under the decision of this Court in *Lathrop* v. *Donohue*, U.S. , 6 L. Ed. 2d 1191, 81 S. Ct. , that the highest courts of the States have inherent power to promulgate rules with respect to the integration of the Bar, including procedures for the initiation of disciplinary proceedings provided the Court retains its traditional power with respect to discipline or disbarment of any member of the Bar. It was specifically noted in the Lathrop case that under the rules adopted by the Supreme Court of Wisconsin, the Supreme Court reserved the power with respect to disciplinary matters. Rule 5 of the Supreme Court of Missouri likewise reserves to it the judicial power to discipline or disbar members of the Bar. This Court specifically noted in Cohen that "A state can constitutionally afford a different procedure —the present procedure—in these judicial investigations from that in criminal prosecutions." (6 L. Ed. 2d l.c. 166) The foregoing authorities fully establish that Rules 4 and 5 promulgated by the Supreme Court of Missouri provide for procedural due process with respect to disciplinary proceedings.

As was noted by this Court in the Cohen case, the principles applicable in denial of admission to the Bar are equally applicable in proceedings for disbarment, so that the constitutional questions decided in the cases of *In re George Anastaplo, Petitioner,* ... U.S. ..., 6 L. Ed. 2d 135, 81 S. Ct. ..., and *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722, and *Konigsberg* v. *State Bar of California,* U.S. ..., 6 L. Ed. 2d 105, 81 S. Ct. ..., are applicable with respect to disciplinary cases. In the first Konigsberg case this Court, after reviewing the record, held that the State determination was without rational support in the evidence, and therefore offensive to the due process clause of the 14th Amendment. The case was remanded for further proceedings. In the second Konigsberg case, the judgment of the Supreme Court of California was affirmed, it having denied Konigsberg admission to the Bar for the reason that his refusal to answer questions obstructed the State of California in determining his qualifications for admission. Petitioner here relies on the first Konigsberg case, and seeks the review of this Court of the evidence before the Supreme Court of Missouri, and found by it to be a sufficient basis for its decision of disbarment. This Court made it abundantly clear in the second Konigsberg case that the ruling of the highest Court of California respecting admission to the Bar related to a matter of exclusive State concern, and absent a deprivation of due process by failure to accord fundamental fairness in the proceedings would not be subject to review by this Court. Again in the *Anastaplo* case, the principle was reiterated, this Court saying, 6 L. Ed. 2d, l.c. 144:

> "We conclude with observing that our function here is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were

> another State Court of Review, still less to express any view upon the wisdom of the State's action. With appropriate regard for the limited range of our authority we cannot say that the State's denial of Anastaplo's application for admission to its Bar offends the Federal Constitution."

The applicable rule was again stated by this Court in *Milk Wagon Driver's Union of Chicago, Local 753 et al.*, v. *Meadow Moor Dairies, Inc.*, 312 U.S. 287. 61 S. Ct. 552, 85 L. Ed. 836, l.c. 841, in this language:

> "It is not for us to make an independent valuation of the testimony before the master. We have not only his findings, but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here involved. The place to resolve conflicts in testimony and in its interpretation was in the Illinois Courts and not here. To substitute our judgment for that of the State Court is to transcend the limits of our authority."

In the Cohen, Konigsberg and Anastaplo cases the dissenting justices expressed concern that the majority opinions validated action taken based on refusal to answer inquiries on constitutional grounds rather than by employment of ordinary investigation and prosecutional processes and a hearing which unquestionably met all the tests of due process.

With prophetic wisdom Rule 5 of the Missouri Supreme Court requires all disciplinary proceedings to be filed and tried in Court. Thus the petition here does not involve a case where petitioner failed to answer questions on constitutional grounds or one where "short shrift" treatment was accorded petitioner.

VI. Rule 23(c) and 23(e).

Because the Petition for the Writ herein repeatedly casts reflection on the fairness and integrity of the Supreme Court of Missouri (Pet. pp. 28, 5, 6, 9, 76, 97) the Advisory Committee and its Counsel (Pet. 28, 37, 77) Respondents in reply have endeavored to fairly meet the Constitutional Questions mentioned regardless of whether properly raised under the rules of this court. We would respectfully point out to the Court here that if we are to have any orderly processes in Petitions for Writs of this kind there should be some accountability for compliance with the Court's rules, and that the Petition for this writ does not comply with either Rule 23(c) or Rule 23(e), which requires that questions for review here be presented without unnecessary detail and by a concise statement of facts. Not only does the Petition attempt to retry this whole case on the merits it even sets out a detailed list of all of the character witnesses in the case headed by a distinguished Missourian who now sits on this Court. In this regard the Court may surely take Judicial Notice of the mutual respect and affection that would necessarily characterize his relations with his own Supreme Court of Missouri and the members of the Advisory Committee; and with the Court's Special Commissioner and the Chief Counsel for the Advisory Committee who served with him on the Board of Governors of the Missouri Bar. The only logical conclusion to be reached is that the proof of Petitioner's guilt had to be all the more conclusive because of the character testimony in the case. The important point is the lengthy identity of the character witnesses has no material bearing on any legitimate Constitutional Question and is in violation of Rule 23(c) and (e).

The voluminous transcript of the evidence on file in this Court will disclose upon a casual examination that the petitioner was accorded full due process of law and in

nowise deprived of any of his constitutional rights. The kind and character of judicial proceedings conducted with respect to the petitioner in this case meets all of the requirements of both the majority and dissenting opinions in the cases to which we have alluded. Petitioner's counsel cross-examined every witness with respect to which petitioner now claims he was denied the right of confrontation. The record shows petitioner at the trial joined in the introduction of the testimony of such witness. Petitioner's other contentions relate to the sufficiency and substantiality of the record and to the contention that the Court did not believe some parol evidence offered by petitioner. These questions are not open for this Court's consideration save in the rare case such as the first Konigsberg case where the determination could be found to be "without rational support in the evidence." No such case is presented here.

CONCLUSION.

Petitioner seeks to cast his constitutional claims which were never timely raised within the ambit of the recent cases decided by this Court respecting admission and discipline of members of the Bar. None of these decisions relate to a fact situation where, as here, there was involved a trial by the highest Court of the State in accordance with traditional judicial proceedings.

The petition fails to comply with rules 23 (c) and 23 (e).

It is respectfully submitted that the petition should be denied.

GENE THOMPSON,
Maryville, Missouri,
ROBERT L. ROSS,
Albany, Missouri,
Attorneys for Respondent, The Advisory Committee.

APPENDIX I—RESPONDENT'S REPLY.

The purpose of this appendix is to set out verbatim that part of record pertaining to the admission of the testimony of four witnesses pursuant to agreement and stipulation of the parties:

From Vol. 1, pp. 4-5:

Mr. Thompson: Now it is my understanding from my consultations with Mr. Boatright, the respondent and his counsel, that as to Mrs. Coy Foster, Glen V. Thompson, Lloyd Connor, David E. Clark, Raymond B. Wade, Ira Gaskin, Edna Ruth Meyer or Edna Ruth Jarboe, O. C. Brown, James R. Smith, Martin Carignan, Francis Tuggle, Norman Fenn and J. P. Hice that counsel have agreed that such testimony where there was a right of cross-examination[1] may be considered without objection, with the exception, Mr. Boatright you might want to make some objection to the relevancy or materiality of the questions and answers. Oh, there is also one other one that you talked to me about, which is not set out in a matter of formal hearing but which I have talked to Mr. Boatright about. There was a deposition taken in the State of New Mexico wherein we have agreed that the issues were substantially the same as involved here. That witness was William Bouse. That is the one you called me about and I do not think there is any question after talking to Mr. Boatright that that deposition comes within the rule of these other witnesses and that that testimony may be considered the same as these other witnesses which I have

1. It is undisputed the petitioner and his counsel confronted and examined each of these witnesses.

just dictated the names into the record. I tried to state what we have agreed to, Mr. Boatright but if I have missed anything I wish you would designate.

The Commissioner: Is there any response on your part.

Mr. Boatright: Yes we are not going to make any objection to the prosecution offering the testimony of the ones that he has enumerated that he intends to offer on the grounds right of cross-examination was not afforded or on the ground that there is any question as to the testimony being admissible as a deposition under the statute. There may be parts of the testimony we will object to because of the nature of the questions that were asked or the incompetency or irrelevancy of the testimony but we are conceding their right to offer and for you to consider as in the nature of depositions the testimony that he has referred to. Of course that applies to us also. If there are any of these that he has enumerated that he does not hereafter offer, we are to have the same right to offer them.[2]

---

2. It is undisputed that the Petitioner offered the testimony of witnesses Mrs. Coy Foster, Glen V. Thompson, Lloyd Connor, David Clark, Raymond B. Wade and Ira Gaskin pursuant to this stipulation, and that Respondent, the Advisory Committee offered the testimony of witnesses, Edna Ruth Jarboe, James R. Smith, Martin Carignan, Francis Tuggle and J. P. Hice under this stipulation. Such testimony (after being specifically identified as to volume and page) was admitted respectively in the record as follows: Jarboe, Vol. 3, p. 950; Smith, Vol. 3, p. 598; Carignan, Vol. 3, p. 723; Tuggle, Vol. 3, p. 825. The record affirmatively showing this testimony admitted without objection.